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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

NORTHERN VIRGINIA REGIONAL PARK AUTHORITY

and

WILLIAM M. LIGHTSEY, *Petitioners,*

v.

UNITED STATES CIVIL SERVICE COMMISSION, and ROBERT E. HAMPTON, JAMES E. JOHNSON, LUDWIG J. ANDOLSEK, COMMISSIONERS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners Northern Virginia Regional Park Authority and William M. Lightsey respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on February 19, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto as Item 1. The opinion of the District Court of the Eastern District of Virginia reported in 307 F.Supp. 888, appears as Item 2. The opinion of the United States Civil Service Commission appears as Item 3.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 19, 1971. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Are the sections of the Hatch Act (5 U.S.C. 7324, 7325, 5 U.S.C. 1501, 1502, 1506), which restrict the political activity of Federal employees and of those State employees who work in an agency financed in whole or in part by Federal funds, unconstitutional by reason of their vagueness, overbreadth and infringement of political and free speech rights?

2. Should this court now re-examine its 1947 decisions which upheld the constitutionality of the Hatch Act by a divided court (*United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947) and *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127 (1947)) in view of the complete erosion of the rationale for those decisions by subsequent decisions of this court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution: First, Fifth, Ninth, Tenth Amendments; Fourteenth Amendment, Sec. 1. (See Appendix, Item 4).

United States Code: Title 5, Secs. 1501, 1502, 1505, 1506, 1508, 7324 and 7325. (See Appendix, Item 5).

STATEMENT OF THE CASE

William M. Lightsey was and is an employee of the Northern Virginia Regional Park Authority, a state agency which receives grants from the United States Department of Housing and Urban Development under the open space land program. While so employed in 1967 he ran for re-election to the Virginia General Assembly as a delegate from Arlington, a political post which he had held for some years past. Thereupon the Civil Service Commission charged him with violating the political activity sections of the Hatch Act applicable to employees of state agencies receiving Federal funds. It found him guilty of such violation and declared that it warranted his removal from his job with the Park Authority. The Authority declined to discharge Lightsey, whereupon the Commission entered an order pursuant to 5 USC 1506 requiring Federal agencies to withhold loans or grants to the Authority in the amount of $26,400.

The Park Authority and Lightsey filed a petition in the District Court for the Eastern District of Virginia under authority of 5 USC 1508, asking the court to set aside the order of the Commission on two grounds: First, that Lightsey was exempt as a person holding elective office under 5 USC 1502(c)(4); and, Second, that the Hatch Act is unconstitutional. (Note: The first ground, which is the subject of the District Court's Opinion and which is briefly referred to in the Opinion of the Court of Appeals, is not a subject of this petition.)

The decision of the District Court was affirmed by the Court of Appeals on the ground that it felt "obliged to regard *Mitchell* and *Oklahoma* as binding precedent

on this lower Federal tribunal." However, the Court of Appeals in its opinion "*acknowledge*[*d*] *the considerable weight of these* [*constitutional*] *arguments.*" (italics supplied)

REASONS FOR GRANTING THE WRIT

I

The rationale of Mitchell and Oklahoma has been so eroded by numerous subsequent decisions of this court that the constitutionality of the Hatch Act should now be re-examined.

In 1947 this Court decided *United Public Workers* v. *Mitchell,* 330 U.S. 75, by a four to three vote, and held the political activity sections of the Hatch Act to be constitutional as affecing Federal employees. On the same day the Court applied its decision in *Mitchell* to *Oklahoma* v. *U.S. Civil Service Commission,* 330 U.S. 127, and held that employees in state agencies receiving Federal funds were similarly restricted in their political activities.

The rationale of *Mitchell* was a balancing of the Hatch Act's goal of promoting efficiency in the civil service against its infringement of First Amendment rights. Underlying this balance was an essential premise that government employment is a privilege, not a right,[1] and may be conditioned upon the denial of political and free speech rights enjoyed by other citizens.

A host of subsequent decisions by this court, most of them in the last ten years, have wholly destroyed this premise and have expanded the areas of freedom of speech, freedom of association and political rights to

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[1] See *McAuliffe* v. *Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517, 518 (1892) referred to in *Mitchell.*

the point where the basis of the *Mitchell* decision is now non-existent.

In the first place Justice Holmes' famous epigram in *McAuliffe* that "petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman" has been flatly repudiated by this court in *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), and in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). In the latter case this court has held that public employment may not be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.

There is a second fundamental premise of the *Mitchell* decision which this court has since specifically rejected. In *Mitchell* the court declared that it was sufficient to uphold the Act if Congress could *reasonably* find that political activity by government employees interfered with the efficiency of public service, 330 U.S. 101. But such test is no longer available, for to sustain legislation which infringes First Amendment rights this court has since held that there must be a show of the "gravest abuses", *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963), or that the interest of the state or Federal government must be "compelling", *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

Thirdly, the "overbreadth doctrine" which this court has applied in recent years to statutes affecting First Amendment rights has completely eroded the rationale of *Mitchell. Shelton* v. *Tucker,* 364 U.S. 479 (1960), *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964) and *United States* v. *Robel,* 389 U.S. 258 (1967). In this last-mentioned case this court indicated that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms" . . .

It is difficult to imagine legislation with a broader sweep into the First Amendment area than the political activity sections of the Hatch Act affecting as it does millions of public employees in matters so vital as their freedom to express themselves on political subjects, to associate for the advancement of their views and to participate in the political life of their country. The Act has an almost incredible breadth. Under it an employee may not be a candidate for a national, state, county or municipal office, may not solicit others to become candidates, may not take an active part in any primary, caucus, political committee or club, may not participate in a political parade, may not drive people to the polls and may not publicly express an opinion in such a way as to constitute taking an active part in a political campaign.[2] This short list does not begin to exhaust the prohibitions accumulated in the 3000 or more decisions of the Civil Service Commission which define prohibited political activity.

Repeatedly in recent years this court has held that statutes which impinge on First Amendment freedoms must be drawn to operate within the narrowest confines, no matter how legitimate the goals they seek to obtain. *United States* v. *Robel,* 389 U.S. 258 (1967); *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

Fourthly, the Political Activity Section of the Hatch Act is unconstitutionally vague by present standards. In recent years this court has emphasized that statutes which touch upon First Amendment rights must be precise and definite. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603, 604 (1967). *Baggett* v. *Bullitt,* 377

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[2] See U. S. Civil Service Commission, Political Activity of Federal Officers and Employees (Pamphlet 20) U. S. Gov't. Printing Office (1966).

U.S. 360, 372, 373 (1964). Section 5 U.S.C. 1501 (5) designates the political activities proscribed by the Hatch Act as "those acts * * which were prohibited on the part of employees in the competitive service before July 19, 1940, by determination of the Civil Service Commission." As the Court of Appeals pointed out in Note 3 to its Opinion, these prior prohibitions numbered more than 3000 and covered a variety of activities difficult to define. In fact, as the Commission on Political Activity of Government Personnel found in 1968, this body of law badly confuses the persons subject to it. As the Commission pointed out in its report (page 9) "A working knowledge of the law requires one to be familiar with the approximately three thousand decisions issued by the Civil Service Commission between 1907 and 1939." And these explanations of the law are themselves couched in such indefinite terms that it is virtually impossible to know with any degree of certainty what conduct is permissible and what conduct will cause a man to lose his job.

Finally the proscriptions of the Hatch Act are inconsistent with the expansion and protection of citizens' voting rights, emphasized in *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964), and subsequent cases on apportionment of state legislatures and on congressional redistricting.

II

The question involved is of great national importance, is a constantly recurring one, and should be finally resolved by this court.

When *Mitchell* was decided there were less than 1 million Federal, State and local government employees (330 U.S. at 106—Note 3). There are more than 10 million today. 1969 *Statistical Abstract of the United*

States, pp. 395 and 429. Moreover, the percentage of state and local employees covered by the Hatch Act has increased enormously since 1947. At that time Federal aid to state and local governments was $2.6 billion. while the 1970 estimate was $25 billion *Statistical Abstract of the United States:* for 1947, 1951 Vol. p. 352; for 1968, 1969 Vol. p. 377. It follows that the number of persons in our country who are stripped by the Hatch Act of their rights to take an active part in politics has mushroomed tremendously.

Cases challenging the validity of the Hatch Act continue to appear in many circuits, evidencing the uncertainties concerning the present validity of *Mitchell* now felt in every corner of the land. The Fifth, Seventh and Ninth Circuit Courts of Appeal have upheld the Act on the basis of *Mitchell. Engelhardt* v. *United States Civil Service Commission,* 304 F.2d 882 (5th Cir. 1962); *Palmer* v. *United States Civil Service Commission,* 297 F.2d 450 (7th Cir.), cert. denied, 369 U.S. 849 (1962); *Kearney* v. *Macy,* 409 F.2d 847 (9th Cir. 1969), cert. denied 397 U.S. 943 (1970).

However, in the great majority of reported state court decisions dealing with the constitutionality of state "little Hatch Acts" since 1964, these acts have been held unconstitutional. *Huerta* v. *Flood,* 103 Ariz. 608, 447 P.2d 866 (1968); *Rosenfield* v. *Malcolm,* 55 Cal. Rptr. 505, 421 P.2d 697 (1967); *DeStefano* v. *Wilson,* 99 N.J. Super. 592, 233 A.2d 682 (Super. Ct. 1967); *Bagley* v. *Washington Township Hosp. Dist.,* 55 Cal. Rptr. 401, 421 P.2d 409 (1966); *Minielly* v. *State,* 242 Ore. 490, 411 P.2d 69 (1966); *Fort* v. *Civil Serv. Comm'n.,* 38 Cal. Rptr. 625, 392 P.2d 385 (1964).[3]

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[3] Contra *Salt Lake City Fire Fighters v. Salt Lake City,* 22 Utah 2d 115, 449 P.2d 239 (1969); *Johnson* v. *Minnesota Civil Serv. Dep't.,* 280 Minn. 61, 157 N.W. 2d 747 (1968).

Within the last sixty days a suit making another full-scale attack on the constitutionality of the Hatch Act has been filed and is now pending in the United States District Court for the District of Columbia, (Civil Action 577-71) Plaintiffs are the National Association of Letter Carriers AFL-CIO (with some 200,000 members); Arlington County Democratic Committee; District of Columbia Democratic Central Committee; Fairfax County Democratic Committee; Montgomery County Democratic Central Committee; Republican Central Committee for Montgomery County, Maryland; and Prince Georges County Democratic Central Committee.

It is submitted that the concern felt by millions of politically hamstrung Americans because of the confusing proscriptions placed upon them by the Hatch Act cannot be dispelled unless and until this court again considers the constitutionality of that statute in the light of all of the developments in the law which have occurred since 1947.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

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May 1971.

APPENDIX

APPENDIX

Item 1

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,559

Northern Virginia Regional Park Authority, and William M. Lightsey, *Appellants,*

versus

United States Civil Service Commission, Robert E. Hampton, James E. Johnson and Ludwig J. Andolsek, Commissioners, *Appellees.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

(Argued December 9, 1970 Decided February 19, 1971.)

Before SOBELOFF,* WINTER and CRAVEN, Circuit Judges.

Edmund D. Campbell (Stuyvesant K. Bearns on brief) for Appellants, and Raymond D. Battochi, Attorney, Department of Justice, (William D. Ruckelshaus, Assistant Attorney General, and Alan S. Rosenthal and Patricia S. Baptiste, Attorneys, Department of Justice, and Brian P. Gettings, United States Attorney, on brief) for Appellees.

SOBELOFF, Senior Circuit Judge:

This case involves the constitutionality of a provision of the Hatch Act that prohibits employees of federally

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* Judge Sobeloff attained the status of Senior Circuit Judge on December 31, 1970.

funded state agencies from engaging in partisan political activity, 5 U.S.C. § 1502(a)(3).[1] Also at issue is the construction of an exemption contained in the Act, 5 U.S.C. § 1502(c)(4),[2] which excludes certain designated officials

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[1] Title 5 U.S.C. § 1502(a)(3) provides:

(a) A State or local officer or employee may not—

(3) take an active part in political management or in political campaigns.

Title 5 U.S.C. § 1501(4) and (5) provide:

For the purpose of this chapter—

(4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—

(A) an individual who exercises no functions in connection with that activity; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization; and

(5) the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

[2] The full text of the exemption, 5 U.S.C. § 1502(c), reads:

(c) Subsection (a)(3) of this section does not apply to—

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or

(4) an individual holding elective office.

employed by such federally funded agencies from the bar against active participation in partisan politics. We shall make a brief summary of the factual background of this case before entering upon a consideration of these legal issues.

I. The Facts

The Northern Virginia Regional Park Authority is a state agency organized by the City of Falls Church and the Counties of Arlington and Fairfax for the purpose of developing and maintaining a system of regional parks. From 1962 to 1967, the Park Authority received grants from the Department of Housing and Urban Development under the Open Space Land Program, 42 U.S.C. § 1500. William M. Lightsey, as Executive Director of the Park Authority since 1963, has had overall responsibility for the supervision of a fourteen-man staff and for the execution of the policies formulated by an eight-man governing body.

In November 1965, Lightsey ran and was elected on the Democratic ticket to represent Arlington County in the Virginia House of Delegates. Shortly thereafter, the General Counsel of the United States Civil Service Commission received a complaint alleging that Lightsey had violated the Hatch Act by actively participating in political campaigns while principally employed in connection with a federally financed activity. The General Counsel dismissed the complaint based on misinformation supplied him by the Department of Housing and Urban Development that no federal grants had been made to the Park Authority during the years 1965 and 1966. The General Counsel informed Lightsey that when the Park Authority did receive grants under then-pending applications, he would be required to refrain from engaging in partisan political activity, and specifically from running for reelection to the Virginia House of Delegates in 1967.

Despite this warning, Lightsey actively and successfully campaigned for reelection from July 11, 1967, to November 8, 1967. On April 10, 1968, the Civil Service Commission initiated administrative proceedings against Lightsey, and by order of May 8, 1969, concluded that Lightsey had knowingly violated the Hatch Act by actively campaigning in the Democratic primary and in the general election of 1967 for the Virginia House of Delegates while still principally employed by the Park Authority. The Commission determined that this violation warranted Lightsey's removal from his position with the Park Authority. When that agency refused to terminate Lightsey's employment, the Commission directed the Department of Housing and Urban Development to deduct the sum of $26,400, an amount equal to two years of Lightsey's compensation, from loans or grants which would otherwise be paid or certified to the Northern Virginia Regional Park Authority. The amount of the penalty accords with the formula prescribed in 5 U.S.C. § 1506.

William Lightsey and the Park Authority brought suit in the District Court under 5 U.S.C. § 1508 seeking a review of the Commission's action. The District Court granted the Government's motion for summary judgment, sustaining the order of the Commission.

The plaintiffs base their appeal from the District Court's decision on two grounds: (1) they allege that 5 U.S.C. § 1502(a)(3) of the Hatch Act is unconstitutional as an infringement of the First Amendment rights of employees of state agencies which receive federal funds; (2) they also urge that even if 5 U.S.C. § 1502(a)(3) is constitutional, Lightsey is exempted from the coverage of that section by 5 U.S.C. § 1502(c)(4) since he was "an individual holding elective office" at the time of the offense with which he was charged.

II. The Constitutionality of U.S.C. § 1502(a)(3)

In *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127 (1947), the Supreme Court in a 5-2 decision upheld the constitutionality of 5 U.S.C. § 1502(a)(3), the section under attack here. The primary constitutional challenge advanced by the state of Oklahoma was that the Hatch Act, insofar as it attempted to regulate the internal affairs of a state, invaded its sovereignty in violation of the Tenth Amendment to the Constitution. Although the majority of the Court in *Oklahoma* did not specifically discuss the First Amendment issues which are raised so forcefully in this appeal, they noted that in the companion case of *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), decided the same day, the Court had sustained against First Amendment challenges an analogous provision of the Hatch Act forbidding *federal employees* in the Executive Branch from engaging in partisan political activity, 5 U.S.C. 7324(a)(2). Both provisions, the Court emphasized, were designed to achieve "better public service by requiring those who administer funds for national needs to abstain from active political partisanship." *Oklahoma, supra* at 143.

Justice Black dissented in *Mitchell* and *Oklahoma,* arguing vigorously that the political activity sections of the Hatch Act were unconstitutional. He underscored that millions of state and federal employees "can take no really effective part in campaigns that may bring about changes in their lives, their fortunes, and their happiness" merely because they are paid out of the public treasury. *Mitchell, supra* at 107. The dissenting Justice objected to the vagueness of the statutory prohibitions and the indiscriminately broad class of employees covered by the Act, for it encompassed those whose political involvement posed no direct or indirect threat of corrupting governmental operations or undermining public confidence in the

integrity of the federal or state apparatus.[3] He contended that

> "laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public." *Id.* at 110.

The appellants in this case assert that a series of Supreme Court opinions since 1947 have undermined the rationale of *Mitchell* and *Oklahoma*, and these decisions should no longer be followed. They point out that the Court in *Mitchell* applied a "reasonable basis" test in evaluating First Amendment issues. It was sufficient, according to this test, that Congress could "reasonably"

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[3] 5 U.S.C. § 1501(5) designates the political activities proscribed by the Hatch Act as "those acts * * * which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission * * *." These prior prohibitions number more than 3000, forbidding among other activities: taking any part in a political meeting; taking an active part in the affairs of a political club; writing for publication or publishing any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction; and expressing an opinion in such a way as to constitute taking an active part in political management or in political campaigns. Moreover, employees are accountable for political activity by persons other than themselves, including wives and husbands, if in fact such activity can be traced to the employee. *See* Rose, *A Critical Look at the Hatch Act*, 75 Harv.L.Rev. 510 (1962).

The Supreme Court in Mitchell declined to examine the validity of the definition of political activity, since the complainant's conduct in that case clearly fell within the language of the statute. It is clear that Lightsey's activity as a Democratic candidate for the state legislature likewise plainly falls within the proscription of taking "an active part in * * * political campaigns." Like the Court in *Mitchell*, we do not pass upon the constitutionality of the other activities prohibited by the Commisison's rules and incorporated into the statute.

find that political activity by the covered employees interfered with the efficiency and integrity of the public service. The appellants emphasize that standards for reviewing statutes abridging the exercise of First Amendment freedoms have changed dramatically since 1947, and that statutes are now subjected to closer judicial scrutiny to determine whether the interests of the Government are compelling, and whether the objectives of the legislation can be accomplished by narrower, less drastic means. *See United States* v. *Robel,* 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539 (1963); *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963); *Shelton* v. *Tucker,* 364 U.S. 479 (1960). According to the appellants, the Hatch Act cannot survive contemporary review under these more rigorous constitutional standards. Their position, in brief, is that Justice Black's dissent in Mitchell reflects the now prevailing viewpoint of the Supreme Court.[4]

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[4] Our attention is called to a number of recent state court decisions which have declared unconstitutional provisions of "little Hatch Acts" broadly proscribing political activity by state employees. Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968); Rosenfield v. Malcolm, 55 Cal. Rptr. 505, 421 P.2d 697 (1967); Bagley v. Washington Township Hosp. Dist., 55 Cal. Rptr. 401, 421 P.2d 409 (1966); Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966); Fort v. Civil Service Commission, 38 Cal. Rptr. 625, 392 P.2d 385 (1964).

In *Bagley,* the California Supreme Court suggested the following formulation of a test for reviewing statutes imposing conditions on public employment which abridge First Amendment freedoms:

> Not only must the conditions annexed to the enjoyment of a publicly-conferred benefit reasonably tend to further the purposes sought by conferment of that benefit but also the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights. Further, in imposing conditions upon the enjoyment of publicly-con-

The appellants cite *Robel* as a prime example of the new constitutional approach. In that case the Court held unconstitutional a section of the Subversive Activities Control Act which barred all members of Communist-action organizations from employment in defense facilities. The Government urged that the purpose of the section was eminently reasonable—to reduce the threat of sabotage and espionage in the nation's defense plants. The Court held, however, that although the government interest in such a prophylactic measure was substantial, the Constitution could not tolerate a broadside prohibition of all Communists from defense facilities regardless of the nature and extent of their activity in the Communist Party, the existence of any intent to further its unlawful aims, or the sensitivity of the position held in the defense establishment. The Court emphasized that Congress must achieve its legitimate goals through legislation having a "less drastic" impact on the exercise of First Amendment freedoms. The appellants in this case argue that by a parity of reasoning, Congress must limit its curtailment of political activity to employees holding "sensitive" government positions and whose activity in partisan politics is substantial.

We acknowledge the considerable weight of these arguments. Nevertheless, we feel obliged to regard *Mitchell* and *Oklahoma* as binding precedent on this lower federal tribunal. This court has previously observed that

> [r]arely would a Court of Appeals be justified in declaring devitalized and no longer to be followed a Su-

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> ferred benefits, as in the restriction of constitutional rights by more direct means, the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefit.

55 Cal. Rptr. at 407, 421 P.2d at 415.

> preme Court decision passing directly on the precise point at issue, because of another decision of the Supreme Court in a related, though different area. The resolution of possible inconsistencies in the Supreme Court's decisions is ordinarily not the prerogative of inferior courts. *Blalock* v. *United States,* 247 F.2d 615, 621 (4th Cir. 1957).

See also United States v. *Longfellow,* 406 F.2d 415 (4th Cir. 1969); *cert. denied,* 394 U.S. 998 (1969); *Ashe* v. *Swenson,* 399 F.2d 40 (8th Cir. 1968), *rev'd,* 397 U.S. 436 (1970). In *Ashe, supra,* Judge (now Justice) Blackmun emphasized:

> This court is not the Supreme Court of the United States. We therefore are not free to disregard an existing fiat and still live holding of the Supreme Court even though that holding is one by a sharply divided tribunal * * *. A change in constitutional concept and the overruling of an existing decision, if indicated at all, is for the Supreme Court and is not for us. Firmness of precedent otherwise could not exist. Further, we deal here with no mere implication or interpretation of language. We are confronted with a specific holding. *Id.* at 45.

In the case at hand, the appellants have cited no Supreme Court case since 1947 dealing specifically either with the Hatch Act or other federal or state legislation involving the identical issue that would justify this court in contradicting the controlling Supreme Court authorities. It is highly relevant that other federal courts have in recent adjudications felt similarly constrained by the decisions of *Mitchell* and *Oklahoma* when constitutional challenges to the Hatch Act have been presented on essentially the same grounds urged here. *Fishkin* v. *United States Civil Service Commission,* 309 F. Supp. 40 (N.D. Calif. 1969),

appeal dismissed, 396 U.S. 278 (1970);[5] *Kearney* v. *Macy*, 409 F.2d 847 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970); *Engelhardt* v. *United States Civil Service Commission*, 304 F.2d 882 (5th Cir. 162), *aff'g*, 197 F. Supp. 806 (M.D.Ala. 1961); *Palmer* v. *Civil Service Commission*, 297 F.2d 450 (7th Cir. 1961), *cert. denied*, 369 U.S. 849 (1962). Conceivably, if the Supreme Court were to make a fresh evaluation of the constitutionality of the Hatch Act today, it might depart from the result it reached in 1947. Our holding is dictated, however, by our duty to give effect to an existing Supreme Court ruling on the precise issue before us. *Mitchell* and *Oklahoma* do not speak merely in the general area of First Amendment rights, from which one would be left to infer what the Court would think about the constitutionality of the Hatch Act. These two cases speak plainly and directly to the validity of the Hatch Act itself, leaving nothing to inference or speculation.

III. The Exemption of 5 U.S.C. § 1502(c)(4)

5 U.S.C. § 1502(c)(4) exempts "an individual holding elective office" from the coverage of 5 U.S.C. § 1502(a)(3). discussed above. The appellants contend that Lightsey was "holding [the] elective office" of Delegate to the Virginia House of Delegates when he campaigned for reelection in 1967, and was therefore not in violation of the Act.

The appellants' argument cannot withstand close scrutiny, for it depends upon reading the exemption out of the context in which it occurs, and requires us to ignore the legislative history of the Hatch Act. The Third Circuit considered precisely this question in *In re Higginbotham*,

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[5] *Fishkin* was dismissed on the ground that the appeal was not filed within the time prescribed by the Rules of the Supreme Court. Justices Black and Douglas thought that probable jurisdiction should be noted.

340 F.2d 165, *cert. denied,* 382 U.S. 853 (1965). In that case a local Democratic alderman, employed on a full time basis by a federally funded local housing authority, ran for reelection. He defended his candidacy on the same ground advanced by Lightsey in this case, namely, that he was exempt as an elective office-holder. The Third Circuit squarely rejected this interpretation of the exemption contained in 5 U.S.C. § 1502(c), as do we.

The legislative purpose of the subsection was to exempt a small but important number of elected state officers and employees whose official duties in their elective positions involve the administration of federally assisted projects. Thus 5 U.S.C. § 1502(c) exempts Governors, Lieutenant Governors, Mayors, elected heads of executive departments, and "individual[s] holding elective office." This last clause was designed to encompass a residual category of state officers, such as an elected state highway commissioner for example, whose elective position includes responsibility for federally funded programs. It was far from the purpose of the exemption provision to tolerate political activity by an employee of an agency administering federal funds merely because he happens to have been elected to an entirely unrelated office.

Other sections of the Hatch Act confirm this interpretation of 5 U.S.C. § 1502(c)(4). When the Hatch Act was originally adopted it contained a section 17 (later dropped in 1948 as obviously unnecessary) that allowed any employee covered by the Act, who had been nominated for any public office before the Act became law, to retain his position with the agency and continue to run for office, provided that if he were elected to the public office he would resign from the government agency. If the appellants' construction of the exemption were accepted, section 17 of the original Hatch Act would have been anomalous. Why would Congress have required the em-

ployee to resign, if 5 U.S.C. § 1502(c)(4), as the appellants maintain, exempted the employee altogether from the prohibition against political activity?

The appellants' construction is also inconsistent with the legislative design of 5 U.S.C. § 1503 which permits state employees subject to the Act to engage in *nonpartisan* political activity, and even to run for elective offices provided those offices and activities are strictly local in nature and completely unrelated to issues and candidates that are identified with national or state political parties. The prime example of such a permissible activity might be running for a nonpartisan local school board. According to the appellants' interpretation, such holders of nonpartisan elective offices would thereafter be free to take part in partisan political campaigns since they would be "individual[s] holding elective office[s]." That result unquestionably would do violence to the congressional intent underlying 5 U.S.C. § 1503 to allow government employees to participate only in nonpartisan local affiairs.

For the reasons stated in this opinion, the judgment of the District Court is

Affirmed.

Item 2

UNITED STATES DISTRICT COURT
E. D. VIRGINIA,
ALEXANDRIA DIVISION.

NORTHERN VIRGINIA REGIONAL PARK AUTHORITY and William M. Lightsey, *Petitioners,*

v.

UNITED STATES CIVIL SERVICE COMMISSION et al., *Respondents.*

Civ. A. No. 201-69-A.

Jan. 6, 1970.

OREN R. LEWIS, District Judge.

MEMORANDUM OPINION

The United States Civil Service Commission on May 8, 1969 found that the petitioner, William M. Lightsey, knowingly violated the Hatch Act, 5 U.S.C. § 1502(a) (3), by taking an active part in political campaigns during 1967. Mr. Lightsey was then the full-time Executive Director of the Northern Virginia Regional Park Authority, an agency financed in whole or in part by federal funds.

The Commission further found that such violation warranted Mr. Lightsey's removal from employment by the Park Authority. 5 U.S.C. § 1505. Mr. Lightsey failed to resign and the Park Authority advised the Civil Service Commission that it did not intend to remove him.

The Commission then took appropriate steps to require federal agencies to withhold loans or grants to the Park Authority in an amount equal to twice Mr. Lightsey's annual 1967 salary. 5 U.S.C. § 1506.

Judicial review by this Court was requested pursuant to the provisions of 5 U.S.C. § 1508.

The withholding order is challenged only insofar as it relates to the original order for Mr. Lightsey's removal.

There are no disputed issues of fact. Mr. Lightsey has been employed by the Northern Virginia Regional Park Authority as its full-time Executive Director since June of 1963—His position is appointive, not elective. He was elected as a Democrat to the Virginia House of Delegates in November of 1965—He served as such and sought re-election in 1967—He was re-elected as a Democrat in November of that year. His service in the Virginia General Assembly was limited to sixty days biennially except upon call of a special session.

[1] Mr. Lightsey says he is exempt from the political restrictions of the Hatch Act, being an individual holding elective office. 5 U.S.C. § 1502(c) (4).

The Court disagrees. Mr. Lightsey was subject to the Act—His partisan political activity in 1967 warranted his dismissal.

Section 1501(4) of Title 5, United States Code, reads:

> " 'State or local officer or employee' means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, * * *."

Section 1502 reads:

> "(a) A State or local officer or employee may not—
>
> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
>
> (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or em-

ployee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) take an active part in political management or in political campaigns.

* * * * * * * * *

"(c) Subsection (a) (3) of this section does not apply to—

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil service system; or

(4) an individual holding elective office."

The Civil Service Commission relies in the main on In re Higginbotham, 340 F.2d 165 (3rd Cir. 1965), cert. den. 382 U.S. 853, 86 S.Ct. 101, 15 L.Ed.2d 91. The petitioner there, an alderman, was a partisan candidate for re-election while employed on a full-time basis by a federally funded housing authority. The employee defended his candidacy for re-election with the contention that he was an "officer holding elective office" and thereby exempted from the prohibition of 5 U.S.C. § 118k. The Third Circuit held the exemption did not apply to an elective officer such as Higginbotham. The court there said:

"The appellant's argument based upon the exemption of 'officers holding elective office' depends upon taking the sentence in which that expression occurs out of context. When, however, it is read as a part of a scheme to regulate the conduct of officers and employees

> of federally assisted state agencies, it falls naturally into place as a provision exempting officers and employees of such agencies who have been elected, rather than appointed, to their positions with the agencies."

The petitioner attempts to get around Higginbotham on the ground that it was decided upon the interpretation given to § 12(a) of the old Hatch Act, 5 U.S.C. § 118k.

He correctly states that the Hatch Act has been recodified since the Higginbotham case by Congress—He incorrectly states that the language of the Act has been changed in material respects.

> " * * * it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." See Fourco Glass Company v. Transmirra Products Corporation, 353 U.S. 222, 77 S.Ct. 787, 1 L.Ed.2d 786 (1957), and Robert E. Lee & Company v. Veatch, 301 F.2d 434, 96 A.L.R.2d 619 (4th Cir. 1961).

[2] The reports of the committee on the judiciary issued by the Senate and the House clearly indicate that no substantive change was intended. The reports read:

> " * * * there are no substantive changes made by this bill enacting title 5 into law * * * " H.R.Rep. No. 901, 89th Cong., 1st Sess. 3 (1965); S.Rep. No. 1380, 89th Cong., 2d Sess. 20 (1966).

The petitioner concedes that the prohibitions of the recodified statute, 5 U.S.C. § 1502(a), are substantially the same as those of the old Hatch Act, 5 U.S.C. § 118k. He says, however, that the present Hatch Act enlarged the exemptions set forth in § 1502(c) (4) by substituting the words "an individual" for "officers," making the exemption now read "an individual holding elective office"—therefore, his being an elected member of the Virginia

General Assembly in 1967 exempts him from the political restrictions of the Act.

Reading the section as the petitioner would have us do would broaden the exemptions, contrary to the clear intent of Congress.

Section 1502(a) (3), which Petitioner Lightsey was found to have violated, prohibits State or local officers or employees from taking an active part in political management or political campaigns.

[3] Subsection (c) of § 1502 refers to the officers or employees mentioned in subsections (a) and (b) and exempts certain of them from the ban on political activities contained in subsection (a). Since the only State or local officer or employee who is not permitted to engage in active political campaigning is such officer or employee primarily employed by a federally assisted State or local agency (see § 1501), the purpose of subsection (c) clearly exempts from that section's ban only such officers or employees who are elected to their positions and not appointed.

[4] The purpose of the Hatch Act is to prohibit political activities among "employees in the states whose employment is made possible by use of Federal funds or appropriations from the Federal Treasury." See 86 Cong. Rec. 2338.

Section 1502(c) (4) was not meant to exempt all elected officials but only those whose principal employment with the State agency was the result of being elected rather than appointed.[1]

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[1] The following colloquy took place on the Senate floor, 86 Cong. Rec. 2340:

> MR. VANDENBURG: Before the Senator leaves the other sections I should like to ask for a further definition of the persons affected, and perhaps I might personify my inquiry by making it specific. Would the pending bill prevent the State high-

Further, broadening the exemption—as Mr. Lightsey would have us do—would render other parts of the Hatch Act, namely, § 1503 which permits non-partisan political activity, inconsistent and meaningless.

[5] Although the Court does not read the letter of the General Counsel of the Commission to Senator Byrd as holding that Mr. Lightsey qualified for exemption from the campaigning restrictions of the Hatch Act because a member of the General Assembly is in line for possible succession to the Governorship—such an interpretation of the Act, if made, is not binding on this Court.

Petitioner's final contention that he is exempt from the provisions of the Act because he was running for re-election—not seeking election in the first instance—totally lacks merit. There is nothing in the statute indicating that Congress intended incumbent members of the State legislatures holding full time appointive jobs with State agencies receiving federal funds could actively participate in partisan politics and those in similar positions seeking elective offices for the first time could not so do.

Congress through the Hatch Act sought better public service by requiring those who administer public funds

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way commissioner of a State from running for Governor of his State while he was State highway Commissioner?

MR. HATCH: In my State it would, because highway commissioners in New Mexico are appointive officers and exercise no policy-making function. The answer to the Senator's question would depend upon the character of the duties of the office he mentions under the law of his own State.

MR. VANDENBURG: In Michigan, the commissioner is an elected official. Therefore, what would the Senator's answer be?

MR. HATCH: I would say that an elective official, probably being charged also with policy-making functions in his department, would not be included in the bill and would be permitted to run for any office he might see fit to seek.

for national needs to abstain from active political participation. See *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947).

The question here is not whether Mr. Lightsey had the right to run for reelection as a partisan member of the Virginia House of Delegates—it is whether he could so do while serving as a full time appointive Executive Director of the Northern Virginia Regional Park Authority, a federally funded State agency.

For the reasons stated, this Court finds that the orders entered by the United States Civil Service Commission in the Lightsey cases are in accord with the cited provisions of the Hatch Act, 5 U.S.C. § 1501 et seq. Therefore, the Government's motion for summary judgment will be granted.

The United States Attorney for this District should prepare an appropriate order in accordance with this memorandum opinion, submit the same to counsel for Mr. Lightsey for approval as to form, and then to the Court for entry.

The Clerk will send copies of this memorandum opinion to all counsel of record.

Item 3

UNITED STATES OF AMERICA
BEFORE THE UNITED STATES CIVIL SERVICE COMMISSION

DOCKET NO. 280

In the Matter of

WILLIAM M. LIGHTSEY

and the

NORTHERN VIRGINIA REGIONAL PARK AUTHORITY

REPORT AND ORDER OF THE COMMISSION

Headnote: It is found that (1) the respondent, William M. Lightsey, took an active part in political campaigns in violation of the provisions of 5 U.S.C. 1502(a)(3), as charged, and (2) the violation warrants removal from employment.

The UNITED STATES CIVIL SERVICE COMMISSION, in session at its offices in Washington, D. C., May 8, 1969, votes having been recorded by

CHAIRMAN ROBERT E. HAMPTON, COMMISSIONER JAMES E. JOHNSON and COMMISSIONER L. J. ANDOLSEK

completes action upon the record in the above captioned case.

Philip J. La Macchia
Hearing Examiner

—with appearances by—

Malcolm P. Littlefield
Attorney for the Government

Edmund D. Campbell
Attorney for Respondent William M. Lightsey

This political activity proceeding is governed by 5 U.S.C. 1501 et seq. and 5 CFR Part 151. It was instituted on April 10, 1968, by Letter of Charges issued by

the General Counsel of the Commission, charging William M. Lightsey (the respondent), Executive Director of the Northern Virginia Regional Park Authority with taking an active part in a political campaign in violation of section 1502(a)(3)[1] of title 5, United States Code, in that:

I

He was a candidate in the primary election held in Arlington County, Virginia, on July 11, 1967, for the Democratic Party nomination to the office of Delegate to the Virginia General Assembly and was nominated at said election.

II

He campaigned as a Democratic Party candidate during the period from July 11, 1967, until he was elected in the general election held in Arlington County, Virginia, on November 8, 1967, to the office of Delegate to the Virginia General Assembly.

Respondent Lightsey admits in his answer the factual allegations of the Letter of Charges. He avers, however, that he did not intentionally violate the Act, and that he had "in good faith assumed and believed that as an 'individual holding elective office' he was exempt from restrictions against taking an active part in political campaigns by virtue of the excepting provision set forth in section 1502(c)(4) of title 5, United States Code."[2] He

[1] This section was formerly a part of section 12 of the Hatch Political Activities Act of 1939, as amended. The administrative provisions of the Hatch Act were codified and reenacted as positive law on September 6, 1966. Public Law 89-554, 80 Stat. 378. The terms "Hatch Act" or "Act" will be used as a convenient general reference to the codified version of the 1939 Act as amended.

[2] This section exempts certain elected officials from the prohibitions against taking an active part in political management or in political campaigns.

further avers that he 'was of course aware of the applicability to him of section 1502(a)(1) and (2) of said statute and has at all times carefully refrained from any violations of the letter or spirit of the prohibitions contained therein.[3]

The respondent stated further in his answer that so long as he remains in the employ of the Northern Virginia Regional Park Authority (Park Authority) he will never again take an active part in political management or political campaigns and that if the Commission is of the view that the retention by him of the office of Member of the Virginia General Assembly is inconsistent with the spirit of the Act, he is prepared to resign that office forthwith. The respondent waived a hearing, and concluded with the prayer that should the Commission find him in violation of the Act, it further find that the violation does not justify removal.

The Northern Virginia Regional Park Authority answered that Respondent Lightsey's political activities had no detrimental effect upon the Park Authority, and concluded with a plea for leniency.

On August 16, 1968, the Assistant General Counsel of the Commission submitted the administrative record to the Hearing Examiner with a Motion for Decision on the Record. In an Order dated September 20, 1968, the Examiner called for an "informal hearing" on the ground that the record before him was incomplete. The informal hearing was held on September 27, 1968, during which counsel for the parties agreed with the Examiner's suggestion that a statutory hearing be held for the limited

[3] Section 1502(a)(1) prohibits persons subject to the Act from using their official authority for the purpose of influencing or interfering with an election; section 1502(a)(2) prohibits such persons from coercing or advising a State or local officer or employee to contribute anything of value to a political organization, agency or person for political purposes.

purpose of adducing evidence on the question whether the admitted violation warrants removal. (Tr. 2, 3)

Pursuant to notice duly served upon the parties, a hearing was held on November 14, 1968, at Washington, D. C.

The Hearing Examiner's Preliminary Report was issued on March 20, 1969. Respondent Lightsey's exceptions to the report were received on April 21, 1969.

Findings of Fact

Based upon the evidence adduced at the hearing, the Hearing Examiner makes the following findings of fact:

1. The Northern Virginia Regional Park Authority was organized by Fairfax and Arlington Counties, and the City of Falls Church, Virginia, pursuant to the Virginia Park Authorities Act, Chapter 21.1, Title 15, Code of Virginia, 1950, for the purpose of planning, acquiring, developing, constructing, operating and maintaining a system of Regional Parks within the geographical limits of their political subdivisions. (Exhibit 6)

2. From 1962 to 1967, the Park Authority applied for and received funds from the Department of Housing and Urban Development under the Open Space Land Program, 42 U.S.C. 1500, as follows (Exhibit 8):

A. *Approvals*

1. Virginia OSA-2

Approved 6-30-62	$261,840	(30% grant)
Amended 10-2-63	—3,000	
	$258,840	
Disbursement 4-23-65	$192,641.40	
Disbursement 8-18-66	54,000.00	
Undisbursed balance	12,198.60	

2. Virginia OSA-6

Approved 9-26-66	$ 96,789	(30% grant)
Amended	12,045	
	$142,380	
Disbursement 9-26-66	$ 3,211	
Disbursement 12-16-66	8,834	
Disbursement 9-28-66	96,789	
Disbursement 12-16-67	33,546	
Fully Disbursed	$142,380	

3. Virginia OSA-22

Approved 8-19-66	$120,500	(50% grant)
Disbursements 3-20-67	$120,500	

3. The respondent has been employed by the Park Authority since June 1963. He is the full-time Executive Director and administrative head of the Park Authority's fourteen-man staff, with overall responsibility for general administration and supervision of program activities under policies formulated by an eight-man governing body. (Exhibit 5)

4. In May, 1966, the Office of the General Counsel of the Commission, having received a complaint alleging a possible violation of the Hatch Act, wrote to the Northern Regional Park Authority and the Department of Housing and Urban Development inquiring whether the Park Authority had received any grants under the Open Space Program in 1965 and 1966. (Exhibits 22, 24)

5. By letter dated June 14, 1966 (Exhibit 25), the Department of Housing and Urban Development reported that it had made no loans or grants to the Park Authority under programs of the Department during the years 1965 and 1966; that grants totaling $368,000 were made to the Authority under the Open Space Land Program during

1962 and 1963; and that applications for grants under the Open Space Land Program were then pending as follows:

Project Number	Grant Requested	Acres	Date Submitted
Va. OS-22	$120,505	196	Aug. 23, 1965
Va. OS-23	23,764	15	Aug. 25, 1965
Va. OS-27	130,000	13	Dec. 22, 1965

6. The respondent replied to the letter from the Office of the General Counsel on May 24, 1966 (Exhibit 23), stating that the Authority received occasional grants from the Federal Government under the Open Space Program; that such grants were used for land and park development purposes; and that none of the grants were used to pay the salary of any employee of the Authority. He further stated that on the basis of telephone calls to him at home and at the Park Authority office, he believed that the Commission may have received inquiries as to whether his political activities violated the Hatch Act. He acknowledged that he had been a successful Arlington candidate for a seat in the Virginia House of Delegates in the Democratic primary and the general election of 1965, and that he was a member of that body. In conclusion, he requested that he be advised of any ruling or opinion of the Commission concerning a violation of the Hatch Act on his part.

7. On July 18, 1966, based upon the letter of May 31, 1966, from the Department of Housing and Urban Development, Exhibit 24, which incorrectly reported that no Federal grants had been made to the Authority during the years 1965 and 1966,[4] the then General Counsel of the Commission advised the respondent as follows (Exhibit 26):

> Reference is made to your letter of May 24, 1966, in which you requested to be informed of the disposition of any Hatch Act complaint against you.

[4] See Finding No. 2.

> A complaint alleging partisan political activity on your part was recently received by the Commission. However, it has been determined that no federal loans or grants have been made to the Northern Virginia Regional Park Authority since 1963. For this reason, you would not be subject to the political activity restrictions of the Hatch Act and the matter has been closed.
>
> It was noted that there are several applications for grants in behalf of the Park Authority now pending with the United States Department of Housing and Urban Development. If such grants are made, you should refrain from engaging in any partisan political activity if your position as Executive Director with the Park Authority is your principal employment.
>
> Enclosed is a copy of the Commission's Pamphlet 20 concerning political activity of federal employees. The pamphlet is equally applicable to state and local agency employees who work in connection with federally financed activities.

8. On September 29, 1966, the respondent, at his request, met with the General Counsel of the Commission to discuss his coverage under the Hatch Act. In a memorandum to the file, the General Counsel summarized the matters discussed with the respondent (Exhibit 28):

> At the request of (name of person), I met with Mr. Lightsey regarding his Hatch Act coverage. It was explained that he would be subject if grants were made to the Regional Park Authority but that he could continue to serve in the State Legislature to which he was elected two years ago. He was cautioned, however, not to run for reelection in the primary next spring when he notified me that a grant had been made to the authority today (September 29, 1966).

I explained to him that the 10 to 15 percent of his time spent with Federally financed activities was sufficient to bring him under the Act. If he is relieved of such functions, he would not be subject to the Act and was so notified. He expects to be in touch with us in the near future. I introduced him to Mr. McCarthy for this purpose.

9. On October 3, 1966, the respondent, accompanied by Mrs. Mary Cook Hackman, Vice Chairman of the Park Authority and a member of the Virginia Bar, presented to Mr. J. James McCarthy, Assistant General Counsel of the Commission, in charge of Hatch Act enforcement, a letter postdated October 14, 1966, labeled, "Draft-For Discussion Only" (Exhibit 29), and a proposed resolution for possible adoption by the Park Authority redefining the respondent's duties and relieving him of certain responsibilities relating to negotiations and initial park development. (Exhibit 29) During this discussion, it became evident to the respondent that it "would be an exercise in futility" to attempt to avoid the political restrictions of the Act by "excluding specific responsibilities for negotiating land acquisition * * * which was what the Federal funds were involved with." He concluded that as administrative head of the Park Authority he could not divorce himself from any of the activities of the Park Authority. (Tr. 42)

10. The meetings of September 29, and October 3, 1966 were sought by the respondent for the purpose of determining whether he could properly run for reelection. (Tr. 43)

11. On October 13, 1966, in a memorandum to the Park Authority, the respondent gave a chronological account of his dealings with the Office of the General Counsel. He stated, among other things (Exhibit 17):

* * * it is possible that my candidacy for re-election to the General Assembly next spring could be deter-

mined by the Civil Service Commission to be a violation of the Hatch Act, warranting suspension. However, I do not consider this to be a probable course of events and believe that, if such ruling should be made, it could be successfully contested.

* * * *

5. Since receipt of the July 18 letter, I have carefully refrained from engaging in any political activity prohibited by the Hatch Act.

* * * *

9. On October 1, I prepared a draft of a proposed letter to Mr. Pellerzi stating the facts in the situation and submitting a Resolution which might be adopted by the Park Authority defining my duties and relieving me of certain responsibilities relating to negotiations and initial park development. I discussed this with Mrs. Hackman. She suggested that a specific provision of the Hatch Act relating to individuals holding elective office might clear me of restrictions on political activity.

10. On October 3, Mrs. Hackman and I met at the CSC offices with Mr. J. James McCarthy, Assistant General Counsel and another member of his staff. We discussed both Mrs. Hackman's particular point and the proposed letter relating to a Park Authority Resolution delineating my duties. These discussions were inconclusive.

12. In a further memorandum, dated December 21, 1966 (Exhibit 18), the respondent notified the Park Authority that it was his "desire to continue to work for the Park Authority and to enter the Democratic Primary campaign this coming spring as a candidate for re-election as an Arlington Member of the House of Delegates;" and that

it was his belief that he could proceed with both activities without violation of the Hatch Act. He further stated:

> It is my desire to continue my work with the Park Authority. Also, it is my present desire to enter the Democratic primary campaign this coming spring as a candidate for re-election as an Arlington member of the House of Delegates. It is my belief that I can proceed with both activities without violation of the Hatch Act. I believe, further, that the effectiveness of my work as Executive Director of the Park Authority may be increased, and certainly not diminished, because I hold office as a member of the General Assembly. These beliefs are supported by legal and political advice I have obtained from a number of people.

13. In April, 1967, the respondent filed his Declaration of Candidacy as a member of the Democratic Party, declaring himself to be a "candidate for nomination to the office of Delegate—Virginia General Assembly to be made at the Primary to be held on the 11th day of July, 1967." (Exhibit 11)

14. The respondent was a candidate in the primary election held in Arlington County, Virginia, on July 11, 1967, for the Democratic Party nomination to the office of Delegate to the Virginia General Assembly and was nominated with 5,768 votes. (Exhibit 12)

15. The respondent campaigned as a Democratic Party candidate during the period from July 11, 1967, until he was elected in the general election held in Arlington County, Virginia, on November 8, 1967, to the office of Delegate to the Virginia General Assembly. (Exhibits 12, 15, 16)

Pertinent Statutory Provisions

5 U.S.C. 1501

For the purpose of this chapter—

(1) "State" means a State or territory or possession of the United States;

(2) "State or local agency" means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof;

(3) * * *

(4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency. * * *

(5) the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

5 U.S.C. 1502

(a) A State or local officer or employee may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) take an active part in political management or in political campaigns.

(b) A State or local officer or employee retains the right to vote as he chooses and to express his opinions on political subjects and candidates.

(c) Subsection (a)(3) of this section does not apply to—

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or

(4) an individual holding elective office.

* * * * * * * * * *

5 U.S.C. 1504

When a Federal agency charged with the duty of making a loan or grant of funds of the United States for use in an activity by a State or local officer or employee has reason to believe that the officer or employee has violated section 1502 of this title, it shall report the matter to the Civil Service Commission. On receipt of the report, or on receipt of other information which seems to the Commission to warrant an investigation, the Commission shall—

(1) fix a time and place for a hearing; and

(2) send, by registered or certified mail, to the officer or employee charged with the violation and to the State or local agency employing him a notice

setting forth a summary of the alleged violation and giving the time and place of the hearing.

The hearing may not be held earlier than 10 days after the mailing of the notice.

5 U.S.C. 1505

Either the State or local officer or employee or the State or local agency employing him, or both, are entitled to appear with counsel at the hearing under section 1504 of this title, and be heard. After this hearing, the Civil Service Commission shall—

(1) determine whether a violation of section 1502 of this title has occurred;

(2) determine whether the violation warrants the removal of the officer or employee from his office or employment; and

(3) notify the officer or employee and the agency of the determination by registered or certified mail.

Conclusions of Law

1. The Commission has jurisdiction of the subject matter and of the parties in this proceeding.

2. Section 1502(a)(3) of title 5, United States Code provides that "(a) State or local officer or employee may not * * * take an active part in political management or in political campaigns." Section 1501(4) defines "State or local officer or employee" as "an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency * * *;" and subparagraph (5) defines the phrase "an active part in political management or in political campaigns as "those acts of political management or political campaigning which were prohibited on the part

of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."

As already mentioned, the statute in terms prohibits those subject to its restrictions from taking an active part in political management or in political campaigns. This is not to say that they may not engage in non-partisan political activity. The Hatch Act interdicts partisan political activity only, *United Public Workers of America (C.I.O.)* v. *Mitchell,* 330 U.S. 75 (1947).

The respondent does not deny that he took an active part in the primary and general elections held in Arlington County, Virginia, in 1967. Indeed, the evidence conclusively establishes that he was an active candidate in both the 1967 primary and general elections held in Arlington County, Virginia; and, moreover, that throughout 1967, he was principally employed as Executive Director of the Northern Virginia Regional Park Authority, a Federally financed local agency. He asserts, however, that as a Member of the Virginia General Assembly he was and is excepted from the political activity restrictions of the statute, since he is "an individual holding elective office" within the meaning of 5 U.S.C. 1502(c)(4).

In support of this assertion, the respondent in his written exceptions to the Hearing Examiner's Preliminary Report, issued on March 20, 1969, argues that since "(t)he General Counsel of the Commission, by letter * * * dated February 17, 1969 * * * construed the exception granting to an individual holding elective office under 5 U.S.C. 1502(c)(4) to include 'the Speaker of the House of Delegates and any other member of the legislature identified in section 24-150 of the Virginia Code,' and since "the respondent stands in the same position with respect to the applicability of 5 U.S.C. 1502(a)(3) as the Speaker of the Virginia House of Delegates and the other members of the Virginia legisla-

ture who are identified in section 24-150 of the Virginia Code," he is entitled to the same exemption as a matter of law. While acknowledging that the last substantive paragraph[5] of the General Counsel's letter of February 17, 1969, is at variance with the preceding portion of the letter, he further argues that the variance indicates "either that the Commission does not accept the Higginbotham case[6] as controlling authority or that (at the very least), 'employee uncertainty as to the right and wrong under the law governing political activity is hardly surprising * * *.'" The report of the Commission on Political Activity of Government Personnel is cited for the latter proposition.

It is interesting to note that at one time in this proceeding the respondent appeared to accept the reasoning of the Court of Appeals in the *Higginbotham* case. In paragraphs 8, 9 and 10 of his answer to the Letter of Charges, he declared:

> 3. Respondent desires to comply fully, unequivocally and in good faith with all provisions of Chapter 15 of Title 5 of the United States Code. If the *Higginbotham* case correctly interprets Section 1502(a)(3) of said statute, respondent may have inadvertently committed a violation thereof. Accordingly, the respondent hereby formally advises the Commission that so long as he is employed by the Northern Virginia Regional Park Authority he will never again take an active part in political management or political campaigns, except those specifically excepted by Section

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[5] This paragraph concluded correctly that "[t]he partial exemption granted by section 1502(c) is limited, therefore, to persons elected to their positions in an agency that receives Federal loans or grants."

[6] *In re Higginbotham*, D. Pa. 1963, 221 F. Supp. 839 aff'd 340 F. 2d 165 (3d Cir. 1965), *cert. denied*, 382 U.S. 853 (1965).

V of the Commission's Pamphlet No. 20 above referred to.

* * * * *

9. In order further to assure the Commission of his desire to comply with the law, respondent further formally advises the Commission that so long as respondent is employed by the Northern Virginia Regional Park Authority he will never again be a candidate for election to the General Assembly of Virginia.

10. Respondent assumes, in view of the opinion of the Attorney General (39 Op. Atty. Gen. 423) referred to on page 15 of the Commission's pamphlet No. 20 cited in paragraph 5 of this answer, that it will not be construed to be a violation of the Hatch Act if respondent now continues as a member of the Virginia General Assembly for the remainder of his two-year term, which ends in January 1970. However, if the Commission is of the view that such retention of public office on his part is inconsistent with the spirit of the statute respondent is prepared to resign as a member of the General Assembly forthwith. Respondent desires to continue as executive director of the Northern Virginia Regional Park Authority, and said Authority wishes to continue to employ him in that capacity. (See copy of letter from chairman of the Authority to the chairman of the Commission, annexed as Exhibit "B").

And in harmony with the position taken in paragraph 8 and 9 of the answer, counsel for the respondent in his summation at the close of the hearing held on November 14, 1968 said (Tr. 99):

> For purposes of this hearing, as we have stated, Mr. Lightsey is not contesting what we consider to be a technical violation of the Hatch Act, despite Mrs. Hackman's considered opinion to the contrary.

> I reached the conclusion, as stated in the answer, that the Higginbotham case was controlling and so advised Mr. Lightsey. I am not testifying, I am stating what appeared in Mr. Lightsey's response.

Though the respondent no longer concedes the violation, whether technical or otherwise, the *Higginbotham* case still stands as a complete bar to the claimed exemption. In that case, the Third Circuit Court of Appeals, in language fully applicable here, reasoned as follows (340 F. 2d 165, at pp. 166, 167):

> The appellant's argument based upon the exemption of "officers holding elective office" depends upon taking the sentence in which that expression occurs out of context. When, however, it is read as a part of a scheme to regulate the conduct of officers and employees of federally assisted state agencies, it falls naturally into place as a provision exempting officers and employees of such agencies who have been elected, rather than appointed, to their positions with the agencies.
>
> * * * *
>
> Nowhere does it appear that the prohibitions of the section were intended to touch the conduct of a state officer whose principal employment is other than with a federally financed agency. If the theory of the appellant that every elective state officer is exempt should be adopted, it would be hard to explain why Congress thought it necessary to exempt the Governor, Lieutenant Governor, Mayors, etc. (all being elective officers) by specific designation or why the Act should have written into it a clause exempting from its provisions persons entirely outside its coverage.
>
> From the foregoing, particularly in the light of the legislative history, it would seem to follow that the fourth sentence was intended to exempt a small but important number of state officers and employees whose

official duties involve in part the administration of federally assisted projects—an elected state highway commissioner, for example—whose political activities would otherwise be banned by the broad proscriptions of the second sentence. Neither the statute, under any logical interpretation, nor the legislative history of Section 12 show any intent on the part of Congress to excuse from the restrictions of 12(a) those officers and employees (other than those expressly exempted) whose employment gives them the opportunity to use the prestige of their position and their control of federal funds, directly or indirectly, for political advantage merely because they might have concurrent or incidental employment as holders of state elective office.

* * * *

Furthermore, § 18 of the Act, 5 U.S.C. § 118n, [now 5 U.S.C. 1503] permits those subject to the Act to take part in nonpartisan political activity. Once elected to nonpartisan offices, they become "officers holding elective office." If the appellant's construction of the exemption should be adopted, such holders of elective offices would thereafter be free to take part in partisan political campaigns and thus Section 18 could be used to circumvent the prohibitions of the political activity restrictions of Section 12.

In short, "[o]nly where the elected office is the principal employment does the fact that the employee holds office though election except him from the provisions against engaging in political management and political campaigns.[7] "

The *Higginbotham* case is controlling in this matter. In October, 1966, the respondent and his then attorney were so advised by members of the staff of the General Counsel's

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[7] See letter dated April 2, 1969, from the General Counsel of the Commission to counsel for the respondent, annexed to respondent's exceptions as Exhibit "C".

Office. (Tr. 82, 83, 87, 88, 89) In his letters dated February 17, 1969 and April 2, 1969, annexed to the respondent's exceptions as Exhibits "A" and "C", the General Counsel of the Commission again cited the *Higginbotham* case. Thus from 1966 to 1969 Commission officials in their discussions and exchange of correspondence with the respondent have consistently hewed to the line elucidated in *Higginbotham.*

Respondent excepts to Finding No. 8, arguing that there is no evidence that a copy of the General Counsel's memorandum of September 29, 1966 was ever sent to the respondent, or that he had any knowledge thereof.[8] The hearing transcript shows that respondent's counsel announced that he had no objection to the memorandum being received in evidence, and further that the memorandum generally conformed with the respondent's recollection of the matters discussed with the General Counsel at the September 25 meeting. (See Tr. 54, 56, 57) The exception is therefore denied.

The Penalty

3. The next question is whether the violation warrants removal. As a rule, the penalty of removal is imposed only for a knowing violation of the Act involving political activity of a substantial character. Conversely, an unintentional violation will not be held to warrant removal. *In the Matter of Clarence M. Rogers, the County of San Juan, Utah, and the State of Utah,* Docket No. 269, February 29, 1968. The respondent asserts that he did not intentionally violate the Act. Further, that during the calendar year 1967 he "in good faith had assumed and believed that as 'an individual holding elective office' he was exempt from restrictions against taking part in political campaigns by virtue of the excepting provisions set forth in Section

[8] The exceptions incorrectly refer to the memorandum as dated April 29, 1969.

1502(c)(4) of title 5, United States Code." (Respondent's Answer, p. 2.)

The assertion that the violation was unintentional in character finds little support in the record. The evidence is clear that at least since July 18, 1966 (Exhibit 26), the respondent was aware that he was subject to the political activity restrictions of the Act, if principally employed in connection with a Federally financed activity. The letter of July 18, 1966, from the General Counsel to the respondent, was explicit on this point. Further evidence of willfulness is seen in the fact that the respondent ran for elective office, although cautioned by the General Counsel of the Commission, during their meeting of September 29, 1966, not to run for reelection in 1967.

The assertion made at the hearing that the respondent relied in good faith on the advice of Mrs. Hackman in concluding that he was excepted from the political activity restrictions of the Act as an individual holding elective office is also untenable. Mrs. Hackman testified that she had advised the respondent that she thought the *Higginbotham* case could be distinguished and "overturned in the courts." (Tr. 82) On the other hand, the record shows that both Mrs. Hackman and the respondent were told at the October 3, 1966 meeting with members of the General Counsel's staff that the exception relating to holders of elective office had been construed and applied in another case (Higginbotham), and that the Court's construction of the exception precluded the respondent from claiming it. (Tr. 88) Accordingly, it is safe to say that the respondent went ahead with his political campaign in 1967 on a calculated risk basis.

It is concluded that the violation was committed under circumstances demonstrating a deliberate disregard of the Act. Moreover, since it is clear that the respondent's political activity as a partisan candidate for State office in both the primary and general elections of 1967 involved both a

conspicuous as well as a serious violation of the Act, it is further concluded that the violation warrants removal.

Ultimate Findings and Order

It is found that the respondent, William M. Lightsey, while principally employed in connection with a Federally financed activity took an active part in political campaigns in violation of 5 U.S.C. 1502(a)(3), as charged. It is further found that the violation warrants the respondent's removal from employment as Executive Director of the Northern Virginia Regional Park Authority.

It Is Ordered that this Report and Order be authenticated by the signature of an authorized official of this Commission and that due notice thereof be given to the parties in interest.

By the Commission:

/s/ James C. Spry
James C. Spry
Executive Assistant
to the Commissioners

Washington, D. C.

Item 4

Constitution of the United States:

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Ninth Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, Section 1:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Item 5

5 U.S.C. § 1501:

For the purpose of this chapter—

(1) "State" means a State or territory or possession of the United States;

(2) "State or local agency" means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof;

(3) "Federal agency" means an Executive agency or other agency of the United States, but does not include a member bank of the Federal Reserve System;

(4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—

(A) an individual who exercises no functions in connection with that activity; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization; and

5 U.S.C. § 1502:

(a) A State or local officer or employee may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency or person for political purposes; or

(3) take an active part in political management or in political campaigns.

(b) A State or local officer or employee retains the right to vote as he chooses and to express his opinions on political subjects and candidates.

(c) Subsection (a)(3) of this section does not apply to—

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or

(4) an individual holding elective office.

* * * * * * * * * *

5 U.S.C. § 1505:

Either the State or local officer or employee or the State or local agency employing him, or both, are entitled to appear with counsel at the hearing under section 1504 of this title, and be heard. After this hearing, the Civil Service Commission shall—

(1) determine whether a violation of section 1502 of this title has occurred;

(2) determine whether the violation warrants the removal of the officer or employee from his office or employment; and

(3) notify the officer or employee and the agency of the determination by registered or certified mail.

5 U.S.C. § 1506:

(a) When the Civil Service Commission finds—

(1) that a State or local officer or employee has not been removed from his office or employment within 30 days after notice of a determination by the Commission that he has violated section 1502 of this title and that the violation warrants removal; or

(2) that the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State in a State or local agency which does not receive loans or grants from a Federal agency;

the Commission shall make and certify to the appropriate Federal agency an order requiring that agency to withhold from its loans or grants to the State or local agency to which notice was given an amount equal to 2 years' pay at the rate the officer or employee was reciving at the time of the violation. When the State or local agency to which appointment within 18 months after removal has

been made is one that receives loans or grants from a Federal agency, the Commission order shall direct that the withholding be made from that State or local agency.

(b) Notice of the order shall be sent by registered or certified mail to the State or local agency from which the amount is ordered to be withheld. After the order becomes final, the Federal agency to which the order is certified shall withhold the amount in accordance with the terms of the order. Except as provided by section 1508 of this title, a determination or order of the Commission becomes final at the end of 30 days after mailing the notice of the determination or order.

(c) The Commission may not require an amount to be withheld from a loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of that amount would jeopardize the payment of the principal or interest on the bond or notes.

5 U.S.C. § 1508:

A party aggrieved by a determination or order of the Civil Service Commission under section 1504, 1505, or 1506 of this title may, within 30 days after the mailing of notice of the determination or order, institute proceedings for review thereof by filing a petition in the United States District Court for the district in which the State or local officer or employee resides. The institution of the proceedings does not operate as a stay of the determination or order unless—

(1) the court specifically orders a stay; and

(2) the officer or employee is suspended from his office or employment while the proceedings are pending.

A copy of the petition shall immediately be served on the Commission, and thereupon the Commission shall certify

and file in the court a transcript of the record on which the determination or order was made. The court shall review the entire record including questions of fact and questions of law. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that the additional evidence may materially affect the result of the proceedings and that there were reasonable grounds for failure to adduce this evidence in the hearing before the Commission, the court may direct that the additional evidence be taken before the Commission in the manner and on the terms and conditions fixed by the court. The Commission may modify its findings of fact or its determination or order in view of the additional evidence and shall file with the court the modified findings, determination, or order; and the modified findings of fact, if supported by substantial evidence, are conclusive. The court shall affirm the determination or order, or the modified determination or order, if the court determines that it is in accordance with law. If the court determines that the determination or order, or the modified determination or order, is not in accordance with law, the court shall remand the proceeding to the Commission with directions either to make a determination or order determined by the court to be lawful or to take such further proceedings as, in the opinion of the court, the law requires. The judgment and decree of the court are final, subject to review by the appropriate United States Court of Appeals as in other cases, and the judgment and decree of the court of appeals are final, subject to review by the Supreme Court of the United States on certiorari or certification as provided by section 1254 of title 28. If a provision of this section is held to be invalid as applied to a party by a determination or order of the Commission, the determination or order becomes final and effective as to that party as if the provisions had not been enacted.

5 U.S.C. § 7324:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic or cultural organization.

(d) Subsection (a) (2) of this section does not apply to—

(1) an employee paid from the appropriation for the office of the President;

(2) the head or the assistant head of an Executive department or military department;

(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of federal laws;

(4) the Commissioners of the District of Columbia; or

(5) the Recorder of Deeds of the District of Columbia.

5 U.S.C. § 7325:

An employee or individual who violates section 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Civil Service Commission finds by unanimouse vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Commission.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1666

NORTHERN VIRGINIA REGIONAL PARK AUTHORITY, ET AL., *Petitioners*

v.

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., *Respondents*

BRIEF OF AMICI CURIAE IN SUPPORT OF CERTIORARI

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May, 1971

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BRIEF OF AMICI CURIAE IN SUPPORT OF CERTIORARI

Submitted by

AMERICAN CIVIL LIBERTIES UNION
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO
UNITED FEDERATION OF POSTAL CLERKS, AFL-CIO
NATIONAL RURAL LETTER CARRIERS ASSOCIATION, AFL- CIO
NATIONAL ASSOCIATION OF POST OFFICE AND GENERAL SERVICES MAINTENANCE EMPLOYEES, AFL-CIO
THE NATIONAL ASSOCIATION OF SPECIAL DELIVERY MESSENGERS, AFL-CIO
NATIONAL FEDERATION OF POST OFFICE MOTOR VEHICLE EMPLOYEES, AFL-CIO
NATIONAL POSTAL UNION
NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES
COALITION OF PUBLIC EMPLOYEE ORGANIZATIONS:
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO
and
NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES

Pursuant to Rule 42(1), this brief in support of the Petition for Certiorari is filed on behalf of the

amici curiae with the consent of all parties.[1] The *amici* are the American Civil Liberties Union (ACLU), the National Association of Letter Carriers, AFL-CIO (NALC), eight other unions of public employees, and the National Education Association (NEA).

The fundamental question presented by the Petition for Certiorari is whether *United Public Workers* v. *Mitchell*,[2] a 24-year-old decision by a 4—3 Court upholding a vague but sweeping legislative limitation on First Amendment rights of public employees to participate in national, state and local politics, is correct today.

The *amici* point out that numerous lower federal courts have felt compelled by the doctrine of *stare decisis* to follow the *Mitchell* case and to uphold the Hatch Act's[3] prohibition against active political management and campaigning, even while, at least in the case at bar, acknowledging the "considerable weight" of arguments that *Mitchell* has been substantially undermined by subsequent decisions of this Court giving expanded protection to fundamental First and Fifth Amendment rights. By contrast, four state courts have followed the Court's more recent decisions rather than *Mitchell* and have invalidated, under the First Amendment of the United States Constitution, state statutes far less restrictive of political activities than the Hatch Act.[4]

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[1] The letters of consent have been lodged with the Clerk.

[2] 330 U.S. 75 (1947).

[3] 5 U.S.C. §§ 1502(a)(3) and 7324(a)(2).

[4] Cases cited in Pet., at 8.

Only the highest court of the land can authoritatively and finally reconcile the continuing conflict between *Mitchell* and its later First and Fifth Amendment cases. Since *Mitchell,* the Court has struck down various governmental restrictions on First Amendment rights on the basis of such concepts as "overbreadth," [5] "chilling effect," [6] "void-for-vagueness," [7] and "lack of compelling governmental interest" [8] and has granted increased recognition to the rights of public employees.[9] These decisions have raised widespread and serious doubts as to the constitutional validity of the Hatch Act, doubts which cannot now be settled by lower federal court decisions relying on what they deem to be the compulsion of *Mitchell* (and thereby conflicting with the thrust of state court decisions) and enforcing restrictions of unclear reach on the rights of ever-growing numbers of public employees to engage in political expression and association and to participate in debate on public issues in an "uninhibited, robust, and wide open" manner. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964).

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[5] *E.g.,* NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

[6] *E.g.,* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Speiser v. Randall, 357 U.S. 513 (1958).

[7] *E.g.,* Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

[8] *E.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Robel, 389 U.S. 258 (1967).

[9] *E.g.,* Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, note 6 *supra.*

INTERESTS OF THE AMICI

The ACLU's interest arises from its organizational purpose of defending and advancing civil liberties. The ACLU believes that the Hatch Act restricts the civil liberties of the large and growing number of public employees who are politically silenced by the Act's prohibition against active political management and campaigning. Accordingly, the ACLU joins in this brief to present to the Court its research and views as to why the Petition should be granted.

The NALC and the other *amici* unions directly represent more than a million and a half government employees, federal, state, county and municipal. The NEA represents another million plus classroom teachers, school administrators and other educational employees.

With few exceptions,[10] all civilian federal and District of Columbia employees are subject to the Hatch Act's prohibition against taking "an active part in political management or in political campaigns." 5 U.S.C. § 7324(a)(2). With the continuing increase in federal grants and loans to states and their subdivisions, substantial and ever larger numbers of state, county, and local employees are covered by the identical prohibition of 5 U.S.C. § 1502(a)(3). See 5 U.S.C. § 1501(4).[11] These millions of citizens, as represented by the *amici* unions, have a direct interest in this challenge to the validity of the statute that, beyond argument, restricts rights which they otherwise would possess under the First, Fifth, Ninth and Tenth

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[10] See 5 U.S.C. §§ 7324(c) and (d).

[11] As to the growth in the number of covered public employees, see Pet., at 7-8.

Amendments. See *United Public Workers* v. *Mitchell*, *supra* at 94-95:

> "Thus we have a measure of interference by the Hatch Act . . . with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And . . . there is a corresponding impairment . . . under the Fifth Amendment."

While most NEA members are exempt from the Act,[12] they nevertheless have a substantial and direct interest in the resolution of the issues presented by this case because they are subject to state laws substantially identical to the Hatch Act or to state laws, municipal ordinances, and school board policies otherwise limiting the political activities in which teachers and school officials may engage.[13]

REASONS FOR GRANTING THE WRIT

Millions of politically concerned public employees have reason to entertain and seek judicial confirmation of the view that the Hatch Act's constitutionality has been placed in doubt by decisions of this Court, more recent than, and rejecting the basic rationale of, the *Mitchell* case, a 24-year-old decision in which only four of the seven participating Justices concurred. Despite rebuffs by lower courts, public employees continue to press constitutional challenges to that Act and similar state statutes. In addition to the instant case and the four federal cases cited in the Petition for Certiorari,[14]

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[12] 5 U.S.C. §§ 1501(4) and 7324(c).

[13] For compilation of state laws regulating political activity of employees, see 2 COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, REPORT, pt. IV (1967).

[14] Pet., at 8-9. (Amicus NALC is a plaintiff in the pending District of Columbia case cited on page 9 of the Petition).

we are aware of seven other rejected, pending or contemplated tests of the continuing authority of the *Mitchell* case in Oregon,[15] California,[16] Maryland,[17] Wisconsin,[18] Colorado,[19] Michigan[20] and New York.[21]

Mitchell's vitality is subject to such widespread doubt because this Court has subsequently and unequivocally rejected the basic rationale of that decision[22] and because government employees today are becoming increasingly concerned over chilling restrictions on their rights and responsibilities to play vigorous and active roles in the electoral processes that shape fundamental policies of the Nation and local governments. This term the Court has recognized that,

> " . . . it can hardly be doubted that the constitutional guaranty [of the First Amendment] has its fullest and most urgent application precisely to

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[15] Gray v. Macy, 239 F.Supp. 658 (D.Ore. 1965), *rev'd on other grounds,* 358 F.2d 742 (9th Cir. 1966).

[16] Fishkin v. United States Civil Service Commission, 309 F.Supp. 40 (N.D. Calif. 1969) (three-judge court), *appeal dismissed for failure to docket the case in time,* 396 U.S. 278 (1970).

[17] Democratic State Central Committee v. Andolsek, 249 F.Supp. 1009 (D.Md. 1966).

[18] Wisconsin State Employees Ass'n v. Wisconsin Natural Resources Bd., 298 F.Supp. 339 (W.D. Wisc. 1969) (three-judge court), *criticized in* Note, *Political Activity and the Public Employee,* 64 N.W. U.L. Rev. 737 (1970).

[19] In the Matter of Valdez, Before the U.S. Civil Service Commission, Docket No. 300, hearing held April 29-30, 1971.

[20] Peterson v. Michigan Employment Securities Commission, Civil No. 352-11 (E.D. Mich. Filed July, 1970) (three-judge court convened).

[21] Under preparation for filing in S.D.N.Y.

[22] See Pet., pp. 4-7.

> the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971).

In addition, four state courts presented with First Amendment issues substantially identical to those in the case at bar have failed to follow *Mitchell.*[23] For example, in *Minielly* v. *State,*[24] the Supreme Court of Oregon held that a state statute, far narrower than the Hatch Act in that it only prohibited civil service employees from running for elective office, was invalid under the First Amendment as construed by this Court in cases subsequent to *Mitchell.* The Oregon Court said:

> "It is apparent from the cases heretofore discussed in this opinion that a revolution has occurred in the law relative to the state's power to limit federal First Amendment Rights. Thirty years ago the statutes now under consideration would have been held to be constitutional, particularly as applied to the factual situation in the present case. This is no longer possible in view of the intervening decisions of the United States Supreme Court. We hold the statutes unconstitutional because of overbreadth." (411 P.2d at 77)

The *amici* are aware of three occasions in the past decade in which the Court has declined to review lower federal court decisions following *Mitchell.*[25] These denials of certiorari have not been, as indeed they could

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[23] Cases cited in Pet., at 8.

[24] 242 Ore. 490, 411 P.2d 69 (1966).

[25] Kearney v. Macy, 409 F.2d 847 (9th Cir. 1969), *cert. denied,* 397 U.S. 943 (1970); Fishkin v. United States Civil Service Commission, note 16 *supra;* Palmer v. United States Civil Service Commission, 297 F.2d 450 (7th Cir.), *cert. denied sub nom.* Illinois v. United States Civil Service Commission, 369 U.S. 849 (1962).

not be, treated as adjudications on the merits.[26] The doctrine of *stare decisis* requires that the lower courts and the bar be given clear guidance as to which precedents, where there is conflict and ambiguity, are controlling. Until the Court addresses itself directly to the impact on *Mitchell* of its subsequent First and Fifth Amendment decisions, millions of affected public employees will not know whether the majority or the dissenting opinions in the *Mitchell* case represent the correct view of their rights today. This is particularly understandable since no lower federal court ever has made any attempt to square the underlying principles of *Mitchell* with this Court's more recent pronouncements but rather have deemed themselves bound by *Mitchell*.[27] In sharp contrast, courts of four states, which have analyzed the issues, have declared their so-called "Little Hatch Acts" to violate the First Amendment.[28]

This case presents a timely and appropriate occasion for this Court to put this important and continually troubling issue to rest. Petitioner Lightsey received a specific warning from the General Counsel of the Civil Service Commission that, as an employee of a federally supported state agency, he was barred by the Hatch Act from running for state office on a party ticket. Despite this warning, he ran and won. The Commis-

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[26] *E.g.*, Brown v. Allen, 344 U.S. 443, 488-97 (1953) (Opinion of Frankfurter, J.); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-20 (1950) (Opinion of Frankfurter, J.).

[27] Cases cited in Pet., at 8, and notes 15-20 *supra*.

[28] Cases cited in Pet., at 8. According to the Commission on Political Activity of Government Personnel, every one of the 50 states has a statute imposing some restriction on the political activity of government employees. 2 *op. cit. supra* note 13, at 92.

sion then held a full administrative hearing, found a violation of the Act, and imposed the appropriate statutory sanction.[29] This case was filed to review that administrative action, and the only issues presented by the Petition for Certiorari are the constitutionality of the Act and the continuing vitality of *Mitchell*.[30] In upholding the Act, the Fourth Circuit held itself obliged to follow *Mitchell* without resolving Petitioners' arguments that *Mitchell* had been undermined by subsequent decisions of this Court. The lower court (Sobeloff, J.) expressly acknowledged "the considerable weight of these arguments"[31] and noted cautiously, by way of *dicta,* that,

> " . . . conceivably, if the Supreme Court were to make a fresh evaluation of the constitutionality of the Hatch Act today, it might depart from the result it reached in 1947." (Pet.App. at 10a)

Indeed, it seems doubtful that the Court's First Amendment decisions of the past decade can be squared with any statute so broad and unclear, and having such a chilling effect on exercise of First Amendment rights as those sections of the Hatch Act which forbid millions of public employees from taking "an active part in political management or in political campaigns." When *Mitchell* was decided, the Court found this restriction to be "within reasonable limits" insofar as it applied to a roller at the mint serving as a ward executive committeeman and a worker at the polls.[32]

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[29] These are the facts as recited in the Fourth Circuit's opinion, Pet. App., at 3a-4a.

[30] Pet., at 3.

[31] Pet. App., at 8a.

[32] 330 U.S. at 101-02.

In 1947, the Court did not make the kind of doctrinal analysis which more recent cases have established as essential in determining the validity of a statute which places such sweeping and chilling inhibitions on the exercise of First Amendment rights. The Court did not then deem it necessary to find any "compelling governmental interest" [33] in the Act's prohibitions which extend to millions of public employees with widely varying duties and forbid all of them, for example, from driving voters to the polls on behalf of a party or candidate, from organizing a "get-out-the-vote" drive on behalf of a candidate, and from endorsing or opposing a candidate in an advertisement or "similar material." [34]

Because the *Mitchell* decision was rendered twenty-four years ago by a narrow majority of less than a full Court, because the court below and four state courts have found that subsequent decisions of the Court have diluted *Mitchell's* precedential authority, because challenges to *Mitchell's* validity are being pressed with increasing frequency in lower courts, because basic constitutional rights of a large and growing segment of the citizenry are at stake, because the Hatch Act restricts those rights in a sweeping manner that is confusing to a large majority of public employees [35] and which never has been judicially found necessary to serve a "compelling governmental interest," and because those rights bear directly on the heart

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[33] Note 7 *supra.*

[34] Current Civil Service regulations construe the Act as prohibiting these activities among others. 5 C.F.R. §§ 151.122(b)(7), (9), (10), and 733.122(b)(7), (9), and (10) (1971 ed.).

[35] 1 COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, *op. cit. supra,* at 20.

and fabric of the democratic process at national, state, and local levels, we urge renewed consideration of the issue by a full Court in the light of present day conditions and current interpretation of First Amendment rights.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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